

Docket: 2008-2075(GST)G

BETWEEN:

1474282 ONTARIO INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 14, 15, 16, 2010 and
September 10, 2010, at Toronto, Ontario

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant: Matthew Morden
Counsel for the Respondent: Samantha Hurst

JUDGMENT

The appeal from the assessment made under the *Excise Tax Act* with respect to the Notice of Assessment dated March 2, 2007 for the period January 1, 2002 to December 31, 2002 is allowed, with costs.

Signed at Ottawa, Canada, this 3rd day of December 2010.

“Diane Campbell”

Campbell J.

Citation: 2010 TCC 620
Date: December 3, 2010
Docket: 2008-2075(GST)G

BETWEEN:

1474282 ONTARIO INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Campbell J.

[1] For the period January 1, 2002 to December 31, 2002, the Appellant claimed Input Tax Credits (“ITCs”) of \$11,447.22 in respect to invoices totalling \$174,979.64. The Minister of National Revenue (the “Minister”) disallowed the ITCs and imposed a penalty and interest. The issue is whether ITCs in this amount were properly disallowed. More specifically, the issue focuses on whether one particular invoice, Invoice 122, issued by M.B. Property Management (“M.B. Management”) to the Appellant, is a validly issued invoice relating to work performed on the construction of two commercial properties located at 1547 and 1541 Hurontario Street in Mississauga (the “Hurontario Project”). The Minister disallowed the Appellant’s claim for ITCs with respect to Invoice 122 on the basis that it was not a valid invoice and that the services were not acquired in the course of the Appellant’s commercial activities at the Hurontario Project. Instead, the Minister contended that Invoice 122 was a composite of four other invoices - Invoices 105, 111, 113 and 116 - that had been issued in respect to a home renovation project of Rajinder Chawla, the director of the Appellant, located at 1143 Mississauga Road (the “Home Project”). The Minister’s position is that the Appellant directed M.B. Management, a sole proprietorship operated by Carmelo Boscarino, which was involved in both projects, to cancel these four invoices and to issue Invoice 122 as a replacement invoice, referencing services related to the Hurontario Project instead of the Home Project.

Consequently, the Minister argues that the services were not provided for the Appellant's use and, accordingly, the Appellant cannot claim the ITCs.

[2] The assumptions of fact upon which the Minister relied are set forth in subparagraphs 10(a) to 10(i) of the Reply to the Notice of Appeal:

- a) the Appellant is a GST registrant with GST Registration No. 87707 8816 RT0001;
- b) the Appellant is a holding corporation with respect to two commercial buildings located at 1547 and 1541 Hurontario Street in Mississauga, Ontario (the "commercial property");
- c) the Appellant is an annual filer for GST purposes;
- d) during the period, the Appellant employed M.B. Property Management ("M.B. Property") as a contractor with respect to its commercial property;

Mr. Rajinder Chawla

- e) Mr. Rajinder Chawla ("Mr. Chawla") is the director of the Appellant;
- f) during the period, Mr. Chawla was having renovations done on his personal residence located at 1143 Mississauga Road (the "home");
- g) Mr. Chawla retained the services of M.B. Property to perform some of the renovations on his home;
- h) M.B. Property was directed to cancel four earlier invoices issued to Mr. Chawla for work performed on his home during the period, which together totalled \$174,979.64, including GST in the amount of \$11,447.22; and
- i) M.B. Property was directed to issue a false invoice in the amount of \$174,979.64, including GST in the amount of \$11,447.22 to the Appellant, despite the fact that the amounts billed were in respect of work done on Mr. Chawla's home rather than the commercial property.

[3] At the beginning of the hearing, the parties filed an Agreed Statement of Facts, which is attached to my Reasons as Schedule "A".

[4] The matter has reached this Court as the result of two audits. During the first audit, the ITCs were allowed with respect to Invoice 122. Subsequently, during an audit of the business of the construction contractor, M.B. Management,

Mr. Boscarino alleged that the Appellant had instructed him to re-invoice certain amounts that related to work on the Home Project and to re-direct them to the Hurontario Project.

[5] The Appellant relied on the evidence of Mr. Virander “Ravi” Chawla. He supervised both of these projects on behalf of the Appellant company and his brother, Mr. Rajinder “Raj” Chawla. Raj Chawla is the president, director and sole shareholder of the Appellant. The Respondent relied on the evidence of Carmelo Boscarino, the manager and shareholder of M.B. Management and of M.B. Interlink Limited (“M.B. Interlink”), together with the evidence of the Canada Revenue Agency (“CRA”) auditor, Frank Ehrentraud. M.B. Interlink is another construction entity operated by Mr. Boscarino.

[6] The appeal to this Court is the culmination of lengthy and contentious dealings among the parties involving litigation and an eventual settlement agreement in the Ontario Superior Court of Justice. Because of the animosity generated by this background and the array of extremely incomplete and unreliable records produced by parties on each side of the equation, I am left with the distinct impression that the entire story may never be known, yet I must attempt to sort through and piece together this documentary “mess” and the contradictory oral testimony of the witnesses in order to provide coherent Reasons.

[7] Because the Appellant had not been incorporated on April 26, 2001, Le Niagara Commodities Corporation (“Le Niagara”), another company in which Raj Chawla is the sole shareholder, entered into an agreement with M.B. Interlink and Carmelo Boscarino. According to the terms of this agreement, M.B. Interlink and Mr. Boscarino agreed to construct the commercial buildings at the Hurontario Project. Raj Chawla’s brother, Ravi, was responsible for overseeing the project, and dealing with Mr. Boscarino on all of the financial aspects.

[8] The Appellant corporation was incorporated on April 27, 2001, the day after the date of this agreement, to develop and eventually lease the buildings related to the Hurontario Project. The Appellant is not a party and never became a party to this agreement, although Ravi Chawla testified that the agreement was entered into for the benefit of the Appellant. The evidence does not support or suggest that the Appellant ever legally adopted the agreement in writing. However, the Appellant became the legal owner of the Hurontario commercial properties on May 16, 2001 and remains the owner today.

[9] Several months later, Mr. Boscarino also agreed to oversee renovations on Raj Chawla's personal residence. The Home Project was governed by an agreement executed on October 3, 2001. Again, Ravi Chawla supervised this project for his brother. Graydel Limited was retained by Mr. Boscarino as the subcontractor to carry out most of the home renovations. However, the evidence suggests that Mr. Boscarino performed some of the subcontracting work on the Home Project. The estimated cost of the home renovations was \$585,000.00. Ravi Chawla testified that Mr. Boscarino requested payments in advance of the issuing of invoices but that he did not receive invoices for all of the cash payments. The invoices, according to Mr. Chawla, were delivered by Mr. Boscarino at the end of the Home Project.

[10] M.B. Management submitted invoices on its letterhead in respect to both projects. The invoices were addressed to the Appellant and subtitled "Re-Le Niagara Commodities Corporation". Most were forwarded to the attention of Ravi Chawla.

[11] The agreement respecting the Hurontario Project contained a payment schedule but, after the first payment was made, the parties stopped following this schedule and, instead of Le Niagara making these payments, the Appellant made the payments. In fact, it was not Le Niagara that made the first payment of \$270,000.00 in May, 2001 but another of Raj Chawla's corporate entities, Fritz Marketing Inc. Mr. Boscarino stated that Ravi Chawla instructed him, at the beginning of the invoicing, to direct the invoices to the Appellant and not Le Niagara. Mr. Boscarino confirmed that the payment arrangement which the parties followed was different than the payment schedule contained in the agreement.

[12] Until the spring of 2002, Raj Chawla and his brother were either oblivious to or simply unaware of the importance of accurate record-keeping for these projects. When the accountant informed Raj Chawla that certain credits could be claimed respecting the Hurontario Project based on supporting records, invoices were requested from Mr. Boscarino to support the payments that had already been made by the Appellant. Ravi Chawla testified that once work began on the Hurontario Project, Mr. Boscarino requested payments and while those payments were made, invoices were not initially requested or obtained to support those payments. Mr. Chawla testified that when he requested that Mr. Boscarino deliver invoices, he prepared invoices addressed to the Appellant and delivered those invoices in batches in January, April and May of 2002. According to Mr. Chawla, receipt of invoices did little to clarify the already existing chaotic record-keeping. Many of the invoices did not record payments that had actually been made. Mr. Chawla testified that he had difficulty sorting through this paper maze and matching an invoice to a payment. He stated that, when he reviewed the records in the spring of 2002 before forwarding

them to the accountant, he reviewed all payments made by the Appellant and verified those payments through the Appellant's records, including the bank account statements. During this review, he discovered that three separate payments had been issued by the Appellant which still lacked supporting invoices. Those three payments were represented by a bank draft payable to Mr. Boscarino and dated October 10, 2001, in the amount of \$107,000.00; a money order payable to Mr. Boscarino and dated February 8, 2002, in the amount of \$35,000.00 and an undated money order payable to Mr. Boscarino in the amount of \$32,979.64. Those three payments could be traced through the Appellant's bank records. Mr. Chawla's evidence is that he instructed Mr. Boscarino to deliver an invoice reflecting these three payments. At this point the stories diverge. Mr. Boscarino issued the invoice over which most of this appeal focuses – Invoice 122. However, he testified that he issued it at the direction of Ravi Chawla to enable the Appellant to claim ITCs to which it would not otherwise be entitled. Put bluntly, Invoice 122 was fabricated, according to Mr. Boscarino, pursuant to the direction of Ravi Chawla, on behalf of the Appellant, and issued in respect of the Hurontario Project when, in fact, Invoice 122 replaced four invoices – Invoices 105, 111, 113, and 116 - which related to work on the Home Project. Mr. Boscarino stated that Invoices 105, 111, and 113 referenced amounts that were paid in cash while Invoice 116 was paid by cheque.

[13] The relationship between the parties deteriorated and Mr. Boscarino did not complete the Hurontario Project. Their issues were eventually resolved through litigation.

[14] The auditor's evidence was that, in the second audit, he relied on statements by Mr. Boscarino that the Appellant had not properly claimed ITCs because Mr. Boscarino had been directed to re-issue a number of invoices that related to work completed on the Home Project and to replace those invoices with Invoice 122, dated May 16, 2002, issued now in respect to the Hurontario Project.

The Appellant's Position

[15] The Appellant paid none of the costs associated with the Home Project. Raj Chawla personally paid the home renovation costs through his brother Ravi, who was overseeing the project. Once the Hurontario Project commenced, cash progress payments were made when Mr. Boscarino requested them, but without the Appellant obtaining supporting invoices. When the Appellant requested those invoices and they were eventually delivered, a number did not match the payments that had been made, according to the Appellant's records, and further supporting invoices were requested.

The Appellant claimed ITCs on only those invoices which it had paid because it acquired the supply, that is, the construction services as the owner of the Hurontario Project. The contract between Le Niagara and Mr. Boscarino for the construction of the buildings at this project was assumed by the Appellant and, as a result, all invoices were addressed to the Appellant and paid by the Appellant. Therefore, Goods and Services Tax (“GST”) was payable by the Appellant. Specifically, Invoice 122 was issued by M.B. Management to the Appellant for work completed on the Hurontario Project and not the Home Project. That invoice represented three amounts of \$107,000.00, \$35,000.00 and \$32,979.64 that had been paid to Mr. Boscarino but without supporting invoices being provided. The Appellant, therefore, acquired the supply for consumption in the course of its commercial activities. Mr. Chawla stated that Mr. Boscarino’s story, that Invoice 122 was a re-invoicing of other invoices for work supplied in relation to the Home Project, is false.

The Respondent’s Position

[16] Invoice 122 was an invoice of “accommodation”, issued upon the direction of Ravi Chawla to enable the Appellant to claim ITCs to which it was not entitled. The Appellant was not the recipient of the supply represented by Invoice 122, as the service was not provided for the Appellant’s use. Instead, the services, for which ITCs are claimed, were completed on Raj Chawla’s personal residence. The Respondent relied on statements made by Mr. Boscarino that M.B. Management was directed to cancel four earlier invoices totalling \$174,979.64, including GST, issued in respect of the home renovations and to replace these invoices with a false invoice - Invoice 122 - in the same amount, for the commercial project, the Hurontario Project. This enabled the Appellant to falsely claim ITCs of \$11,447.22 in respect to Invoice 122.

Analysis:

[17] The first issue that I must address is whether, in assessing the oral testimony of the witnesses, particularly Mr. Chawla and Mr. Boscarino, and the documentary evidence, as incomplete and unsatisfactory as it was, Invoice 122 was, as the Respondent contends, an invoice of accommodation or whether it was properly issued in respect to work performed on the Hurontario Project. If I decide that it did not relate to work on the Hurontario Project but, rather, to the Home Project, that ends the analysis and disposes of the appeal. However, if I accept the Appellant’s argument on this point, then I must next consider whether the Appellant was the

recipient of the construction services and therefore entitled to claim ITCs in respect to the Hurontario Project.

[18] Neither the records of Mr. Chawla nor of Mr. Boscarino are entirely reliable. Many of the invoices were not created contemporaneously with the completion of different phases of the work or with the payments. Mr. Chawla admitted to directing the re-issuance of some invoices that he disagreed with. The evidence supports that Mr. Boscarino delivered multiple invoices, which contained the same identifying numbers but reflected various dates and payments. Paragraph 14 of the Agreed Statement of Facts contains a list of invoices delivered by Mr. Boscarino, but the invoice numbers, when compared to the dates of the invoices, do not follow sequentially. The same invoice number sometimes referenced entirely different dates and amounts.

[19] Whether Invoice 122 is a fabricated invoice, that was created and re-directed to the commercial project so that the Appellant could claim ITCs, is a question of fact. The Appellant bears the burden of establishing its case and overcoming or demolishing the Minister's assumptions of fact. At paragraph 15 of *Amiante Spec Inc. v. The Queen*, [2009] F.C.J. No. 603, Trudel J. refers to the Supreme Court of Canada decision in *Hickman Motors Ltd. v. The Queen* (1997), [1997] 2 S.C.R. 336, and goes on to state:

... the taxpayer has the initial burden of demolishing the exact assumptions stated by the Minister. This initial onus is met where the taxpayer makes out at least a *prima facie* case that demolishes the accuracy of the assumptions made in the assessment. Lastly, when the taxpayer has met his or her onus, the onus shifts to the Minister to rebut the *prima facie* case made out by the taxpayer and prove the assumptions (*Hickman*, supra, at paragraphs 92, 93 and 94).

[20] So what evidence do I have that would support that Invoice 122 was issued respecting work performed on the Hurontario Project? Mr. Chawla testified that he never instructed Mr. Boscarino to cancel four invoices on the Home Project and replace them with Invoice 122. While his records on the Home Project were incomplete, he maintained that it was done informally because any accounting for that project was meant for himself and his brother, Raj Chawla, who owned the home. He maintained that his brother made, and he delivered, substantially more cash payments to Mr. Boscarino on the Home Project than were reflected in the invoices. He also claimed that, in respect to the Hurontario Project, he could trace the record of payments through the Appellant's bank statements. He stated that, when Mr. Boscarino eventually supplied the invoices, there were insufficient invoices to cover all of the payments that the Appellant had made respecting this project. In fact, Mr.

Chawla alleges that the home renovation invoices were not delivered until close to the end of that project and, therefore, subsequent to the date on which Mr. Boscarino testified he cancelled four invoices and issued Invoice 122. This would not be surprising, as most of the invoices were not made contemporaneously with the completion of the work phases or with the payments that were being made.

[21] Mr. Boscarino stated that he created invoices for the Hurontario Project based on the periodic reports of the architect and then delivered them to the Appellant within several days of the date of each report. However, that testimony does not correlate to the number of multiple invoices that contain the same number but which reference various amounts and contain different dates. In addition, Exhibit R-2, which, according to Mr. Boscarino, was created to provide an accounting of all the payments and disbursements for the Hurontario Project, contains a number of invoices with the word "Paid" stamped at the bottom. Mr. Boscarino testified that those invoices were stamped within days of payment of the invoice. However, it is glaring that, again, these invoice numbers do not appear sequentially and the summary does not account for the fact that if they were delivered to the Appellant in close proximity to the dates contained on the invoices, why then did Mr. Boscarino deliver multiple invoices containing the same invoice numbers, sometimes for different amounts and containing different dates? I was never given a credible explanation for this. I am unable to place any weight on the letter of the accountant containing the summary of the billings of Mr. Boscarino, as it was created after the fact in February, 2004 and apparently based on information supplied only by Mr. Boscarino.

[22] Exhibit R-3 contains a handwritten list of payments of Mr. Boscarino respecting the Hurontario Project. The first payment is in relation to a cheque respecting a GST amount of \$17,663.40, and referencing a deposit amount of \$270,000.00 on May 2, 2001. However, Mr. Boscarino, in explaining why an invoice was not delivered until October, 2001, when payment had been made to him in May, 2001, stated that it was because of a dispute as to whether the GST amount was included, or in addition to, the deposit amount of \$270,000.00. Again, I am left with the impression that the record contained in Exhibit R-3 was not created contemporaneously as contended. Either the record is a contemporaneous compilation of payments and, therefore, there was no dispute regarding this GST amount as Mr. Boscarino claims, or there was a dispute and, therefore, this record was a re-creation of those payments at a later date.

[23] I conclude that this record is again a re-creation and this is further supported by the dates contained in the left-hand column of this exhibit which are not in

chronological order as one would expect them to be if the document were a contemporaneous creation of events as they unfolded.

[24] Exhibit R-4 contained invoices, handwritten notes and a summary memoranda of payments respecting the Home Project. The handwritten note at page 7 entitled “Made by Ravi Chawla” contains a handwritten notation at the bottom stating:

PROGRESS PAYMENT #1 = 100,000.⁰⁰ + GST
\$107,000.⁰⁰

At one point, Mr. Boscarino’s evidence was that this notation at the bottom was written by him and was acknowledged by the signature of Ravi Chawla appearing below this notation and bearing the date October 3, 2001 below Mr. Chawla’s signature. However, the same handwritten note of Ravi Chawla also appears at Exhibit A-1, Tab 86, page 152, containing the same information concerning allowances, together with his signature and again dated October 3, 2001, but omitting the above-referenced handwritten notation. On cross-examination, the following exchange occurred between Mr. Boscarino and Appellant’s counsel concerning the omission of the handwritten note:

Q. Mr. Boscarino, I want to take you to tab 86 in the big book, please. I would like you to go to the third page there. Would you agree that this document is quite similar to the other document we were just referring to?

A. Yes.

Q. It doesn’t have that notation regarding the progress payment \$107,000.

A. Correct.

Q. It was signed on October 3, 2001.

A. Yes.

Q. Mr. Boscarino, I put it to you that you added the note, “Progress payment \$107,000” sometime afterwards.

A. Yes.

Q. So Mr. Chawla’s signature there has nothing to do with that payment.

A. No.

Q. You told us before that his signature acknowledged that payment, which was not the case.

A. Correct.

(Transcript, page 275, lines 1-23)

[25] The conclusion I must draw is that Mr. Boscarino added this note to Mr. Chawla's memo above Mr. Chawla's signature on October 3, 2001 at some time subsequent to this date with the intent to mislead.

[26] Exhibit R-7 contained a list of payments and deposit amounts (similar to the list for the Hurontario Project contained at Exhibit R-3) respecting the Home Project, together with statements from the line of credit of Mr. Boscarino and a page of handwritten notes. Again, I have difficulty placing much weight with respect to any of this information contained in these documents because I doubt they were drafted contemporaneously due to several dates on the first page summary list not being in chronological order as one would expect. Also, this summary is incomplete as it does not reflect the cash payments that were made respecting this project.

[27] The auditor testified that, initially, Mr. Boscarino advised him that Mr. Chawla instructed him to re-invoice Invoices 111, 113 and 116 and to replace them with another invoice, Invoice 122. There was no mention of Invoice 105 and the evidence remains unclear as to how exactly it became part of the audit. This is reflected in Exhibit A-2, Tab 8, a Memo for File created by the auditor in the course of the audit after speaking to Mr. Boscarino, where Invoice 105 is not included as one of the invoices that was replaced by Invoice 122. Without Invoice 105, Invoices 111, 113 and 116 total \$181,590.00, not \$174,979.64, the amount contained on Invoice 122. However, initially, Mr. Boscarino's evidence on examination-in-chief was that Invoice 122 was comprised of Invoices 105, 113 and 116, which total \$170,389.64. In reviewing the auditor's calculations, Mr. Boscarino subsequently changed his testimony and recalled that a partial payment, or as Mr. Boscarino referred to it a "short payment", of \$4,590.00 respecting Invoice 111 had been added, along with the other invoice amounts from Invoices 105, 113 and 116, to total the amount equalling the amount contained in Invoice 122.

[28] According to Mr. Boscarino, in following directions to cancel invoices, he relied on a note written by Ravi Chawla on a notepad of Fritz Marketing Inc. (Exhibit A-1, Tab 104, page 188), which lists three amounts of \$107,000.00, \$35,000.00 and

\$32,979.64 and opposite each of those amounts the note contains the dates of October 10, February 8 and March 15 respectively. However, this handwritten note, on its face, does not specifically refer to any invoice numbers nor does it refer to the Home Project. In addition, it refers to only three amounts, not four amounts from four invoices. Except for Mr. Boscarino's testimony, there is no suggestion in the documentary evidence that a so-called short payment of a fourth invoice was made and, without the fourth invoice short payment, the other invoices do not total the same amount as Invoice 122. When I review Mr. Chawla's explanation of this note, it just seems to be more in line with what probably occurred. Until May 2002, these parties exchanged payments but neither made any effort to ensure documentation was in place in support of those payments. When Mr. Chawla's accountant made suggestions concerning the requirement of records for the commercial project, Mr. Chawla reviewed the Appellant's bank statements respecting the payments made on the Hurontario Project. He discovered the three payments that were made, listed them on the Fritz Marketing Inc. notepad and requested a supporting invoice. These three payments were supported by and could be traced through the Appellant's bank statements ["Value Assist Plan Deposit Account", with the Bank of Montreal on October 10, 2001 (Exhibit A-1, Tab 58), February 8, 2002 (Exhibit A-1, Tab 67) and on March 13, 2002 (Exhibit A-2, Tab 68)]. This note, which does in fact reference the Hurontario Project, is more consistent with Mr. Chawla's evidence and the documentary evidence than it is with that of Mr. Boscarino's.

[29] In addition, according to Mr. Chawla, the amount of \$107,000.00 was paid in October, 2001. According to the documentation, at the beginning of October, 2001, Mr. Boscarino's line of credit had an outstanding balance of approximately \$107,000.00. At this time, no work had been commenced on the Home Project. At this same time, Mr. Boscarino had, however, completed preliminary work during the months leading up to October 2001 on the Hurontario Project. This further supports that this amount was, as Mr. Chawla testified, an expense incurred by the Appellant in respect to the commercial project. Payment of Invoice 116 also supports Mr. Chawla's explanation for these invoices. This invoice, dated January 16, 2002, was paid on December 12, 2001 by personal cheque of V. (Raj) Chawla and his spouse, N. Chawla (Exhibit A-2, Tab 9). The invoice references the Home Project and contains a handwritten notation at the bottom:

Paid
Cheque #137 dtd Dec 12, 2001

(Exhibit A-1, Tab 92)

This supports that Invoice 116 was, in fact, paid in respect to the Home Project and that payment was drawn on the Chawlas' personal account. It also further supports the parties' habit of providing payment (on December 12, 2001) and then worrying about a paper trail at a later date (invoice dated January 16, 2002).

[30] For these reasons, I conclude that Invoice 122 was properly rendered in respect to payments that had been made by the Appellant and for work that had been completed on the Hurontario Project.

[31] The next issue is whether the Appellant is properly entitled to claim the ITCs as specified in Invoice 122 on the Hurontario Project. Subsection 169(1) of the *Excise Tax Act* (the "Act") sets out the conditions that a taxpayer must satisfy to successfully claim ITCs. This provision states:

169. (1) General rule for [input tax] credits - Subject to this Part, where a person acquires or imports property or a service or brings it into a participating province and, during a reporting period of the person during which the person is a registrant, tax in respect of the supply, importation or bringing in becomes payable by the person or is paid by the person without having become payable, the amount determined by the following formula is an input tax credit of the person in respect of the property or service for the period:

$$A \times B$$

where

A is the tax in respect of the supply, importation or bringing in, as the case may be, that becomes payable by the person during the reporting period or that is paid by the person during the period without having become payable; and

B is

(a) where the tax is deemed under subsection 202(4) to have been paid in respect of the property on the last day of a taxation year of the person, the extent (expressed as a percentage of the total use of the property in the course of commercial activities and businesses of the person during that taxation year) to which the person used the property in the course of commercial activities of the person during that taxation year,

(b) where the property or service is acquired, imported or brought into the province, as the case may be, by the person for use in improving capital property of the person, the extent (expressed as a percentage) to which the person was using the capital property in the course of commercial activities of the person immediately after the capital property or a portion thereof was last acquired or imported by the person, and

c) in any other case, the extent (expressed as a percentage) to which the person acquired or imported the property or service or brought it into the participating province, as the case may be, for consumption, use or supply in the course of commercial activities of the person.

[32] In *General Motors of Canada Limited v. The Queen*, 2008 TCC 117, [2008] T.C.J. No. 80, at paragraph 30, I outlined the three conditions that must be satisfied in respect to subsection 169(1):

[30] In order for GMCL to be eligible to claim an ITC, pursuant to subsection 169(1) in respect of GST payable by it on receipt of Investment Management Services, three conditions must be satisfied:

- (1) The claimant (GMCL) must have acquired the supply (the Investment Management Services);
- (2) The GST must be payable or was paid by the claimant (GMCL) on the supply (the Investment Management Services);
- (3) The claimant (GMCL) must have acquired the supply (the Investment Management Services) for consumption or use in the course of its commercial activity.

[33] The Appellant argued that it meets the conditions in subsection 169(1) because it acquired the supply, that GST was payable and paid by the Appellant and that the supply of construction services in relation to the Hurontario Project was acquired for consumption or use in the course of its commercial activities. The Respondent's position is that the Appellant was not the recipient of the supply represented by Invoice 122 because it was not a party to the contract for services respecting the Hurontario Project. The parties to that contract were Le Niagara and M.B. Interlink, together with Mr. Boscarino.

[34] Although the Appellant never formally adopted the contract in writing, respecting the Hurontario Project, its actions and conduct, as well as the actions and conduct of the parties to the contract, support the intent of all parties that the Appellant be bound by the terms and conditions of this agreement.

[35] On May 16, 2001, the Appellant purchased the land upon which the Hurontario Project was to be erected and obtained the necessary approvals for the development from the municipality. Mr. Boscarino submitted invoices for this project on letterhead of M.B. Management. The invoices were directed primarily to the attention of the Appellant, and were addressed first to the Appellant and, second, to

Le Niagara in the following manner: “Re-Le Niagara”. This implies that the invoice was to the primary attention of the Appellant. The Appellant paid these invoices and, where Fritz Marketing Inc., another of Raj Chawla’s companies, paid the occasional invoice, Mr. Chawla’s evidence was that the Appellant reimbursed Fritz Marketing Inc. The evidence suggests that it was the Appellant, and not Le Niagara, that was intricately involved with the execution of the terms of this agreement, and this included overseeing the dealings with Mr. Boscarino. In fact, all of the relevant parties, and particularly Mr. Boscarino and his corporate entities, treated the Appellant as a party to the agreement. The auditor’s forensic accounting report, prepared by Grant, Thornton, in respect to M.B. Interlink, characterized the Appellant as a party to the contract and, in the opening Introduction and Background, stated the following:

In April, 2001, 1474282 Ontario Inc., through Le Niagara Commodities Corporation entered into an agreement with M.B. Interlink Limited and Mr. Carmelo Boscarino to construct two buildings located at 1541 and 1547 Hurontario Street in Mississauga, Ontario.

(Emphasis added)

[36] It is also telling that the assumptions, relied upon in the Reply to the Notice of Appeal, also characterize the Appellant as a party to the agreement where, at paragraph 10(d), it states:

d) during the period, the Appellant employed M.B. Property Management (“M.B. Property”) as a contractor with respect to its commercial property;

(Emphasis added)

[37] With such an arrangement among the parties and the intent that the Appellant be involved in and treated as a party to this contract on the Hurontario Project, any supplier or subcontractor seeking to enforce payment would have looked to the Appellant, among others, in enforcing its rights and resolving any disputes.

[38] With respect to the first condition in subsection 169(1) of the *Act*, I conclude that the Appellant, as the legal owner of the Hurontario Project that made all payments related to this project, acquired the services and supply at issue.

[39] Subsection 169(1) also requires that the Appellant has paid the GST in respect to the supply or that it was payable by the Appellant. The evidence supports that the Appellant paid all of the invoices in respect to the Hurontario Project. Specifically for

Invoice 122, three payments could be traced through the Appellant's bank account. Subsection 123(1) of the *Act* defines "recipient" as:

"recipient" of a supply of property or a service means

(a) where consideration for the supply is payable under an agreement for the supply, the person who is liable under the agreement to pay that consideration,

(b) where paragraph (a) does not apply and consideration is payable for the supply, the person who is liable to pay that consideration, and ...

A determination in respect to this condition must focus on which party is liable contractually to pay the GST. The parties did not follow the payment schedule contained in the contract covering the project. In fact, after the first payment by Fritz Marketing Inc., it bore no resemblance to the contractual arrangement – the party paying the invoices was different than stated in the contract, the party being paid was different and the amount of the payments was different. They followed an entirely different payment arrangement and, pursuant thereto, the invoices were issued, not by M.B. Interlink, as the contract anticipated, but by M.B. Management, and they were issued not to Le Niagara, again as anticipated by the contract, but to the Appellant. This applied to all of the invoices, not only Invoice 122. Mr. Boscarino agreed that it was a different payment arrangement than the arrangement contained in the contract. There was no dispute that the contractual payment terms were not followed and the documentary evidence, in the form of the invoices, supports this. Following my Reasons at paragraph 54 of the *General Motors* decision, I believe that liability crystallizes upon delivery of the invoices. Ultimately, the Appellant was responsible for payment of Invoice 122 under this alternate payment arrangement upon delivery of that invoice and it would be liable in an action to collect on Invoice 122 or, for that matter, any of the invoices relating to this project.

[40] The Appellant is in the business of owning and leasing commercial space. In particular, the Appellant is the owner of two commercial buildings referred to as the Hurontario Project and continues today to lease commercial space in those buildings. Since I have already concluded that Invoice 122 was issued by Mr. Boscarino and payments were made by the Appellant in respect to the Hurontario Project and not in relation to the Home Project of Raj Chawla, the third condition of subsection 169(1) is met because the Appellant clearly acquired the supply for consumption or use in the course of its commercial activities. In fact, it is interesting that the Minister accepted all of the other similarly worded invoices relating to this project issued by M.B. Management to the Appellant, with the exception of Invoice 122. The Minister

accepted that those other invoices were validly issued in respect to work relating to the Appellant's commercial activities. For example, Invoices 128 and 130, although they failed to list the supply in question and referenced the supply as progress payments, were accepted by the Minister. Invoice 122 was similarly worded. This wording appears to be specific to the method of payment employed by the Appellant and M.B. Management.

[41] In summary, Invoice 122 meets the requirements of subsection 169(1) and of subsection 169(4) of the *Act* and the *Input Tax Credit Information (HST/GST) Regulations* (the "*Regulations*"). Invoice 122 is a validly issued invoice containing the Appellant's name as the recipient of the supply, as well as other pertinent information required pursuant to the *Regulations*. As a result, the Appellant is entitled to claim the ITCs described and contained in Invoice 122.

[42] The appeal is allowed, with costs.

Signed at Ottawa, Canada, this 3rd day of December 2010.

"Diane Campbell"

Campbell J.

Schedule "A"

Court File No. 2008 – 2075(GST)G

TAX COURT OF CANADA

BETWEEN:

1474282 ONTARIO INC.

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

AGREED STATEMENT OF FACTS

The parties, through their counsel, agree to the facts as set out below. Where documents are referred to below the parties have agreed only to their authenticity. This agreement is without prejudice to the right of either party to adduce further evidence provided such evidence is not inconsistent with the facts agreed to by the parties, and the respondent specifically reserves the right to challenge the legal validity of the transactions described herein.

Parties

1. The Appellant, 1474282 Ontario Inc. ("147"), was incorporated on April 27, 2001 in Ontario. It owns two commercial buildings at the municipal address of 1541 and 1547 Hurontario Street, Mississauga, Ontario (the "Hurontario Buildings").

2. 147 is an annual GST filer with the GST Registration No. 87707 8816 RT0001.
3. At all material times, Rajinder Chawla ("Raj") was the president, director and sole shareholder of 147. He is married to Nora Chawla.
4. Virander Chawla ("Ravi") is Raj's brother and at all material times he was the vice president of 147. He is married to Neelam Chawla.
5. Le Niagara Commodities Corporation ("Le Niagara") was incorporated in Ontario on August 1, 2000. Raj is the sole shareholder of Le Niagara.
6. Fritz Marketing Inc. is a corporation.
7. M.B. Property Management is an unincorporated sole proprietorship operated by Carmelo Boscarino ("Boscarino"). It is unknown whether M.B. Interlink Ltd. was ever incorporated. It is also operated by Boscarino. At all material times, M.B. Property Management and M.B. Interlink Ltd. carried on business as, among other things, construction contractors.
8. On April 26, 2001, Raj, Ravi, Le Niagara, Boscarino, and M.B. Interlink Ltd. entered into a contract for the construction of the Hurontario Buildings (the "Hurontario Project").
9. By agreement dated September 20, 2001, signed 3 October 2001, Ravi on behalf of Raj, and Boscarino entered into a contract for renovations to Raj and Nora's residence at 1143 Mississauga Road, Mississauga, Ontario (the "Home Renovation").

The Hurontario Project

10. M.B. Interlink Ltd. and Boscarino agreed to oversee the construction of 2 two-storey buildings for Le Niagara. Raj and Ravi (the "Hurontario Agreement"). The estimated cost for the Hurontario Project was \$1,092,590.
11. On May 16, 2001, 147 acquired the property with the municipal address of 1541 and 1547 Hurontario. It also planned for the development of the property and obtained approval from the municipality of Mississauga.
12. Boscarino submitted invoices for the Hurontario Project on M.B. Property Management letterhead. The invoices were addressed to 147 and re: Le Niagara.
13. On May 1, 2001, a cheque in the amount of \$270,000 was paid to Boscarino from the account of Fritz Marketing Inc.

14. The following invoices were delivered by Boscarino:

Invoice Number	Date	Amount (including GST)	Paid
107	10 October 2001	\$270,000.00 (\$17,663.55 GST)	1 May 2001 (\$270,000) - paid by cheque #5033 from Fritz Marketing Inc.
108	26 November 2001	\$40,000.00 (\$2,616.83 GST)	26 October 2001 (\$30,000) - paid by BMO bank draft 26 November 2001 (\$10,000) - paid by personal cheque
109	31 December 2001	\$141,807.09 (\$9,277.10 GST)	31 December 2001 (\$141,807.09) - paid by 147 cheque
102	31 December 2001	\$57,945.31	
104	31 December 2001	\$122,709.00	
105	2 January 2002	\$84,749.48	
104	16 January 2002	\$68,385.84	
104	16 January 2002	\$200,805.57 (\$13,136.70 GST)	29 January 2002 (\$212,604.99, also for 105 and 117) - paid by 147 cheque
105	16 January 2002	\$83,379.91	
105	16 January 2002	\$2,140.00 (\$140 GST)	29 January 2002 - paid by 147 cheque from BMO
106	16 January 2002	\$58,850.00	
107	16 January 2002	\$270,000.00 (\$17,663.55 GST)	

107	16 January 2002	\$64,173.46	
119	16 January 2002	\$4,390.83	
117	4 February 2002	\$9,659.42 (\$631.92 GST)	29 January 2002 – paid by 147 cheque from BMO
118	4 February 2002	\$216,675.00 (\$14,175 GST)	21 February 2002 (\$216,675) – paid by BMO bank draft
106	12 March 2002	\$100,045.00 (\$6,545 GST)	15 April 2002 (\$110,419.80, also for 199 and 120) – paid by BMO bank draft
119	10 April 2002	\$374.80 (\$24.51 GST)	15 April 2002
120	10 April 2002	\$10,000.00 (\$654.20 GST)	15 April 2002
121	15 April 2002	\$48,297.12 (\$3,159.59 GST)	26 April 2002 (\$48,297.12) – paid by BMO bank draft
123	10 May 2002	\$60,000.00 (\$3,925.20 GST)	21 May 2002 (\$60,000) – paid by BMO bank draft
123	10 May 2002	\$77,179.10	
122	16 May 2002	\$174,979.64 (\$11,447.22 GST)	*10 October 2001 (\$107,000) – paid by BMO bank draft 8 February 2002 (\$35,000) – paid by BMO bank draft 13 March 2002 (\$32,979.64) – paid by BMO bank draft
124	7 June 2002	\$7,875.20 (\$512.20 GST)	13 June 2002 (\$15,365.20, also for 125) – paid by BMO bank draft

125	7 June 2002	\$7,490.00 (S490 GST)	13 June 2002
126	26 June 2002	\$128,400.00 (S8,400 GST)	
127	9 July 2002	\$18,290.00	
127	9 July 2002	\$23,640.00	
126	15 July 2002	\$100,000.00 (S6,542 GST)	19 July 2002 (\$100,000) – paid by BMO bank draft
128	30 July 2002	\$53,136.75	
128	30 July 2002	\$75,000.00 (S4,906.50 GST)	9 August 2002 (\$75,000) – paid by BMO bank draft
129	9 August 2002	\$32,000 (S2,093.45 GST)	27 August 2002 (\$32,000) – paid by 147 cheque
130	23 September 2002	\$101,650.00	

* See notes in paragraph 17 below about invoice 122

15. Each invoice bears "GST # 890926892" and itemizes the amount of GST payable.
16. 147 claimed GST input tax credits on the paid invoices.
17. Invoice 122, 16 May 2002, was paid by three bank drafts dated 10 October 2001, 8 February 2002, and 13 March 2002.
18. Boscarino did not complete the Hurontario Project. Boscarino and 147 were parties to an action in the Ontario Superior Court of Justice in respect of the Hurontario Project. The parties settled the dispute by way of confidential Minutes of Settlement.

19. The Hurontario Buildings were completed in 2003. 147 still owns the Hurontario Buildings.

The Home Renovation

20. In September 2001, Boscarino agreed to undertake the renovations on Raj's residence. The estimated cost was \$585,000.
21. Ravi supervised the Home Renovation.
22. Boscarino retained a subcontractor, Graydel Limited, to carry out the Home Renovation.
23. Ravi made payments on the Home Renovation by cheque and cash.

24. M.B. Property Management delivered invoices for the Home Renovation to Ravi as follows:

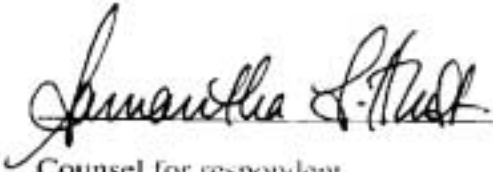
Invoice Number	Date	Amount (Including GST)
113	16 January 2002	\$107,000 (\$7,000 GST)
114	16 January 2002	\$48,000 (\$3,140.16 GST)
115	16 January 2002	\$18,000 (\$1,177.56 GST)
116	16 January 2002	\$35,000 (\$2,289.70 GST)
111	4 February 2002	\$39,590 (\$2,590 GST)
105	4 March 2002	\$28,389.64 (\$1,857.25 GST)
123	30 May 2002	\$10,424 (\$681.94 GST)

Dated at Toronto this 14th day of June 2010.



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COURT FILE NO.: 2008-2075(GST)G

STYLE OF CAUSE: 1474282 ONTARIO INC. AND
HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: June 14, 15, 16, 2010 and
September 10, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice Diane Campbell

DATE OF JUDGMENT: December 3, 2010

APPEARANCES:

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